This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0209

State of Minnesota,
Respondent,

vs.

Emilio Nieto,
Appellant.

Filed December 13, 2021
Affirmed in part, reversed in part, and remanded
Frisch, Judge

Nobles County District Court
File No. 53-CR-20-43

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Joseph M. Sanow, Nobles County Attorney, Worthington, Minnesota; and

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Considered and decided by Reyes, Presiding Judge; Frisch, Judge; and Halbrooks, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

FRISCH, Judge

On appeal from a conviction for importing controlled substances across state borders, appellant argues that the arresting officer impermissibly expanded the scope of the traffic stop and that the evidence at trial was insufficient to prove his guilt. We affirm in part, reverse in part, and remand for further proceedings.

FACTS

In the early morning hours of January 13, 2020, a Worthington police officer was stationed near Highway 60 and Interstate 90. The officer observed a vehicle exit the interstate, pass the officer's squad car, and immediately return to the interstate. The officer believed this conduct to be unusual and decided to follow the vehicle. The officer observed multiple traffic violations and eventually stopped the vehicle. Appellant Emilio Nieto was in the front passenger seat of the vehicle, and his aunt was in the driver's seat.

Following discussions with Nieto and his aunt, the officer asked the aunt for her consent to search the vehicle, which she granted. During the search, the officer discovered a total of 25 pounds of methamphetamine inside the vehicle. The officer arrested Nieto and his aunt.

Respondent State of Minnesota charged Nieto with first-degree possession of methamphetamine in violation of Minn. Stat. § 152.021, subd. 2(a)(1) (2018), importing controlled substances across state borders in violation of Minn. Stat. § 152.0261, subd. 1 (2018), and conspiracy to import controlled substances across state borders in violation of Minn. Stat. §§ 152.0261, subd. 1, .096, subd. 1 (2018). Nieto filed a motion to suppress

the evidence obtained from the search, alleging that the officer lacked a reasonable, articulable suspicion to expand the traffic stop. Following a contested hearing, the district court denied the motion to suppress.

The district court held a court trial on September 3, 2020. The arresting officer testified that he discovered methamphetamine in the rear area of the vehicle as well as inside of a backpack located in the backseat.

The state also introduced into evidence an audio recording and transcript of an interview of Nieto by a narcotics detective. Nieto told the detective that he was accompanying his aunt on a car trip to assist with driving. The trip originated in Arizona and Nieto believed they were going to Las Vegas. But during the trip, Nieto learned that the destination was not Las Vegas. When Nieto and his aunt reached Utah, he picked up his aunt's backpack, and it felt very heavy to him. Nieto's aunt told him that there was "sh-t" in the backpack, and Nieto understood "sh-t" to mean methamphetamine. At some point, Nieto understood that he and his aunt would be traveling to Minnesota and that the drugs in the car were to be delivered to someone in Owatonna, although he did not know the identity of the recipient. Nieto clarified that he never physically handled any drugs.

The district court found Nieto guilty of all three charges and made the following findings of fact, relevant to this appeal. Nieto accompanied his aunt on a cross-country trip to assist her with driving. An officer stopped a vehicle driven by Nieto's aunt, with Nieto sitting in the front passenger seat. In the vehicle, the officer located two backpacks: an empty black backpack belonging to Nieto and a gray backpack filled with methamphetamine. The officer also discovered methamphetamine in the rear of the

vehicle. Nieto did not know about the drugs in the car when his aunt picked him up in Arizona. Sometime later while they were driving through Utah, Nieto moved the gray backpack and discovered that it was very heavy. Nieto's aunt told him that the backpack contained "sh-t," which Nieto understood to mean methamphetamine.

The district court concluded that Nieto knowingly and unlawfully possessed a controlled substance and imported it across state lines in violation of Minn. Stat. § 152.0261, subd. 1, and sentenced him to 86 months' imprisonment.[1]

This appeal follows.

DECISION

I. The officer had a reasonable, articulable suspicion to expand the traffic stop to search the vehicle.

Nieto first argues that the officer did not have a reasonable, articulable suspicion to expand the traffic stop to search the vehicle and that the district court should have suppressed the evidence obtained from the search.

When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine whether the district court erred in not suppressing the evidence as a matter of law. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We review the district court's factual findings for clear error and its legal determinations de novo. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009).

[1] The district court found Nieto guilty of all three counts, but no conviction was entered for counts 1 and 3 and a sentence was only pronounced for the violation of Minn. Stat. § 152.0261, subd. 1.

The United States and Minnesota Constitutions guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. Accordingly, evidence obtained pursuant to an unconstitutional search or seizure must be suppressed. *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011). Warrantless searches and seizures are generally unreasonable. *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992). But police may conduct "[a] limited investigative stop . . . if there is a particularized and objective basis for suspecting the person stopped of criminal activity." *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002).

Moreover, officers may expand "the scope of the stop" to investigate "other suspected illegal activity" only if the officer has reasonable, articulable suspicion of such other illegal activity. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968)). A search that is not closely connected to the initial justification for the stop must, therefore, be supported by independent reasonable suspicion. *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004).

The reasonable-suspicion standard is met when an officer observes conduct that leads the officer to "reasonably conclude in light of his or her experience that criminal activity may be afoot." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quotation omitted). This standard is not high, but it requires more than an unparticularized hunch. *Id.* "It is enough that a law enforcement officer can articulate specific facts which, taken together with rational inferences from those facts, objectively support the officer's suspicion." *State v. Lugo*, 887 N.W.2d 476, 486 (Minn. 2016). When determining whether

an officer reasonably suspected criminal activity, we consider the totality of the circumstances. *State v. Martinson*, 581 N.W.2d 846, 852 (Minn. 1998).

Nieto argues that the officer failed to articulate reasons sufficient to justify an expansion of the stop to include a search of the vehicle. Although Nieto acknowledges that the officer identified particular reasons for expanding the stop, Nieto argues these reasons do not inherently suggest criminal activity and are consistent with innocent behavior. We disagree.

At the contested omnibus hearing, the officer set forth his justification for the expansion of the stop to search the vehicle, including (1) the observed suspicious driving activity of exiting the interstate, passing the officer's squad car, and then immediately reentering the interstate in the middle of the night; (2) observations of Nieto's nervous behavior; (3) an "overwhelming" smell of air freshener in the vehicle, which the officer testified was consistent with his experience that drug traffickers sometimes use air fresheners to mask the odor of drugs; (4) the abnormal lack of luggage for a cross-country trip; (5) discrepancies in the vehicle information provided by Nieto's aunt, including a lapse in the vehicle registration, a VIN check showing a different registered owner of the vehicle, and an insurance-policy term that did not align with the vehicle registration date, all of which were similar to discrepancies that the officer had encountered in previous cases involving the transportation of narcotics; (6) "unusual, suspicious" behavior by Nieto's aunt while speaking with the officer; (7) vague and conflicting stories given by Nieto and his aunt about their trip and planned destination; (8) the Las Vegas vehicle registration, which the officer testified to be a known drug trafficking hub; and (9) Nieto's aunt's prior

arrest for possessing drugs in her vehicle. Importantly, the officer relied upon his expertise and prior experiences involving the trafficking of narcotics to draw reasonable inferences from these observations to expand the traffic stop to search the vehicle.

Nieto cites to authority where observations similar to some of those described above were deemed insufficient to provide a basis for expanding a traffic stop. *See State v. Fort*, 660 N.W.2d 415, 416-17, 419 (Minn. 2003) (finding that a passenger displaying signs of nervousness and that stop occurred in high-crime area did not justify expanding the stop); *State v. Bell*, 557 N.W.2d 603, 606 (Minn. App. 1996) (finding the strong smell of cologne, presence of cigars, and prior reports of crime in the area to be insufficient reasons to expand a stop), *rev. denied* (Minn. Mar. 18, 1997). But we do not view these reasons in isolation. *See Martinson*, 581 N.W.2d at 852 ("[W]hile each individual factor is consistent with innocent travel, all of the factors together may amount to reasonable suspicion."). Unlike the cases cited by Nieto involving limited reasons to expand a traffic stop, here, the officer cited numerous reasons, which, taken together, establish a reasonable, articulable basis to have expanded the scope of the traffic stop. We therefore find no error by the district court in its conclusion that the officer articulated a reasonable basis in light of his observations and experience to conclude that criminal activity may have been afoot.

II. The evidence is insufficient to sustain Nieto's conviction.

Nieto argues that the evidence presented at trial was insufficient to prove beyond a reasonable doubt that he possessed the methamphetamine found in the vehicle.

In evaluating sufficiency-of-the-evidence challenges, we "carefully examine the record to determine whether the facts and the legitimate inferences drawn from them would

permit the factfinder to reasonably conclude that the defendant was guilty beyond a reasonable doubt." *State v. Waiters*, 929 N.W.2d 895, 900 (Minn. 2019) (quotation omitted). We assume that the fact-finder "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). This standard of review applies so long as a conviction is adequately supported by direct evidence. *State v. Horst*, 880 N.W.2d 24, 39 (Minn. 2016). Direct evidence is "evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *State v. Harris*, 895 N.W.2d 592, 599 (Minn. 2017) (quotation omitted).

If the state uses circumstantial evidence to prove an element of the offense, we apply a heightened standard of review to the evidence underlying that element. *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013). Circumstantial evidence is "evidence from which the factfinder can infer whether the facts in dispute existed or did not exist." *Harris*, 895 N.W.2d at 599 (quotation omitted).

To be convicted of importing a controlled substance across state borders, the state was required to prove that Nieto crossed into Minnesota "while in possession of an amount of a controlled substance that constitutes a first-degree controlled substance crime." Minn. Stat. § 152.0261, subd. 1. "The state bears the burden of proving all the elements of an offense beyond a reasonable doubt, and the prosecutor is prohibited from shifting the burden of proof to a defendant to prove his innocence." *Finnegan v. State*, 764 N.W.2d 856, 864 (Minn. App. 2009), *aff'd*, 784 N.W.2d 243 (Minn. 2010).

Possession may be proved through evidence of constructive possession.[2] *Harris*, 895 N.W.2d at 601. Constructive possession exists where "the state cannot prove actual or physical possession at the time of the arrest but where the inference is strong that the defendant at one time physically possessed the [narcotics] and . . . continued to exercise dominion and control over it up to the time of the arrest." *State v. Florine*, 226 N.W.2d 609, 610 (Minn. 1975). The state may establish constructive possession in two ways: (1) by showing that the contraband was found in a place subject to the defendant's exclusive control where others did not normally have access or (2) if found where others did have access, by showing that "there is a strong probability (inferable from other evidence) that at the time the defendant was consciously exercising dominion and control over it." *Id.* Constructive possession may be proved by direct or circumstantial evidence. *State v. German*, 929 N.W.2d 466, 472 (Minn. App. 2019). "A defendant may possess an item jointly with another person." *Harris*, 895 N.W.2d at 601.

The state argues that the direct-evidence standard of review applies because the officer's observations and Nieto's statements established that Nieto drove with his aunt across state lines knowing that drugs were in the car. This argument, however, conflates "knowledge" with "possession." While the state proved through direct evidence that Nieto was aware of the existence of drugs in the car, the direct evidence does not establish that Nieto possessed those drugs. Nieto was not driving when the officer stopped the vehicle. The drugs were not discovered in Nieto's backpack or with any of his property. Nieto

[2] The parties agree that there is no evidence that Nieto actually or physically controlled the drugs at the time of his arrest.

stated that he did not own the drugs, and no drugs were found on his person. And there was no direct evidence that Nieto possessed or exercised control over the drugs at the time of the stop. To convict based on Nieto's statement that he accompanied his aunt on the trip to assist her with driving requires an inference that he intended to transport the drugs in the car. In other words, the state actually relies on circumstantial evidence to support its conclusion that Nieto constructively possessed the drugs.

We review the sufficiency of circumstantial evidence by conducting a two-step analysis. *German*, 929 N.W.2d at 472. First, we identify the circumstances proved by the state. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). We "assume that the [fact-finder] resolved any factual disputes in a manner that is consistent" with the verdict. *State v. Moore*, 846 N.W.2d 83, 88 (Minn. 2014). Second, we determine whether the circumstances proved are consistent with guilt and inconsistent with any rational hypothesis other than guilt. *Loving v. State*, 891 N.W.2d 638, 643 (Minn. 2017). We do not defer to the fact-finder's choice between reasonable inferences. *Silvernail*, 831 N.W.2d at 599. We must reverse the conviction if a reasonable inference other than guilt exists. *Loving*, 891 N.W.2d at 643. But we will uphold the verdict if the circumstantial evidence forms "a complete chain" which leads "directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *State v. Peterson*, 910 N.W.2d 1, 7 (Minn. 2018) (quotation omitted).

We first determine the circumstances proved by the state. *Silvernail*, 831 N.W.2d at 598. Nieto accompanied his aunt on a trip to assist her with driving.[3] The trip started in Arizona. Nieto was unaware of the existence of drugs in the vehicle at the start of the trip. When Nieto and his aunt reached Utah, Nieto picked up the grey backpack belonging to his aunt and discovered that it was heavy. Nieto's aunt informed him that the backpack contained "sh-t" and Nieto understood his aunt's statement to mean that the backpack contained methamphetamine. An officer in Minnesota stopped the vehicle. The vehicle was driven by Nieto's aunt and Nieto was sitting in the front passenger seat. Inside of the vehicle, the officer discovered two backpacks: an empty black backpack belonging to Nieto located on the middle rear passenger seat and a gray backpack filled with methamphetamine located on the floor behind the passenger seat. Methamphetamine was also discovered in the rear of the vehicle.

We next consider whether the circumstances proved are consistent with the defendant's guilt and preclude any rational hypothesis inconsistent with his guilt. *Loving*, 891 N.W.2d at 643. The state contends that the only reasonable inference that can be drawn

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[3] We note that the details regarding Nieto and his aunt's trip to Minnesota were elicited during an interview with law enforcement facilitated by an interpreter. Our review of the transcript suggests that language barriers may have affected Nieto's ability to fully comprehend the investigator's questions. However, Nieto has made no argument that his statements to the investigator were involuntary or should be suppressed.

We also note that the district court did not make any explicit credibility determinations regarding the veracity of Nieto's statements to the officers. Even if the district court believed that Nieto did not fully disclose the extent of his involvement in transporting drugs, the absence of such evidence is not affirmative proof of Nieto's involvement. Thus, even if we excluded from the circumstances proved Nieto's statements to the investigators, we would still conclude that there are no circumstances proved that would exclude the reasonable inference that Nieto never actually drove the vehicle.

from the circumstances proved was that Nieto constructively possessed the methamphetamine in the vehicle. We disagree.

The state argues that Nieto constructively possessed the methamphetamine by exercising dominion and control over it because he drove the vehicle containing the drugs across the country with his aunt. The district court adopted this theory. However, the circumstances proved do not establish that Nieto ever actually drove the vehicle. The circumstances proved only establish that Nieto accompanied his aunt on the trip to assist with driving. Even assuming that Nieto drove the vehicle at some point, the circumstances proved do not establish that Nieto drove the vehicle after he learned that drugs were present inside of the vehicle. The district court's conclusion that Nieto was guilty because he "controlled the movement of the methamphetamine across the country when he became aware of the nature of the substances in the car and continued to help drive them to Minnesota" is not supported by any evidence in the record. Although the district court inferred that Nieto did indeed drive the vehicle at some point after learning of the presence of the drugs, we are not required to give deference to this inference. *Silvernail*, 831 N.W.2d at 599. The record contains no evidence that Nieto actually drove the vehicle at any time or otherwise controlled the movement of the drugs, including after he discovered the presence of drugs in the vehicle. And none of the circumstances proved compel such an inference to the exclusion of all others. *See State v. Sam*, 859 N.W.2d 825, 835-36 (Minn. App. 2015) (identifying methods by which the state can eliminate other rational hypotheses inconsistent with guilt in contraband cases). In other words, the factual linchpin of both the state's case and the finding of guilt by the district court is not supported by the record.

See State v. Novak, 233 N.W. 309, 310 (Minn. 1930) (concluding that the district court's rejection of defendant's testimony cannot alone support a finding of fact to the contrary).

Here, the circumstances proved do not preclude the rational hypothesis that Nieto did not drive the car after he became aware of the presence of drugs in the vehicle. The circumstances proved permit the rational hypothesis that Nieto remained a passenger in the car as it traveled to Minnesota and exercised no dominion or control over the drugs or transport of those drugs. *See Florine*, 226 N.W.2d at 610 (explaining that state must prove that defendant constructively possessed illegal substances and have knowledge of the nature of the substance). The circumstances proved permit the rational hypothesis that Nieto did not exercise any control over the movement of the drugs in the vehicle. Because the circumstances proved do not preclude a rational hypothesis inconsistent with guilt, we reverse Nieto's conviction for importing controlled substances across state borders.

Finally, the district court also found Nieto guilty of two additional charges, first-degree possession of methamphetamine in violation of Minn. Stat. § 152.021, subd. 2(a)(1), and conspiracy to import controlled substances across state borders in violation of Minn. Stat. §§ 152.0261, subd. 1, .096, subd. 1. Because the district court did not adjudicate guilt or pronounce sentence on either count, the merits of the district court's findings are not properly before us on appeal. Minn. R. Crim. P. 28.02, subd. 2(1) (stating that an appeal taken from a final judgment means "when the district court enters a judgment of conviction and *imposes or stays a sentence*" (emphasis added)). And because these two convictions are not properly before us on appeal, we do not decide whether the evidence was sufficient to sustain these convictions. *See State v. Ashland*, 287 N.W.2d 649, 650

(Minn. 1979). We therefore remand to the district court for consideration of the unadjudicated convictions in a manner consistent with this opinion.

Affirmed in part, reversed in part, and remanded.